IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 486 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-
and
Hon'ble MR.JUSTICE D.P.BUCH sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

FAKIRBHAI SIKANDARBHAI K

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 486 of 1993
MS BANNA S DUTTA for Petitioner No. 1 - (absent)
Mr.KP RAVAL, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 24/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. The Appellant - accused, through Jail, has challenged in this Appeal the impugned Judgment and order of conviction and sentence dated 21.10.1992 passed by the learned Sessions Judge, Amreli, in Sessions Case No.62 of 1992 whereby he was convicted for the offences u/s.363, 366 and 376 I.P.Code and sentenced to suffer R.I. for 2 years and fine of Rs.1000/- i/d to under-go imprisonment of 2 months for the offence u/s.363 I.P.Code and R.I. for 3 years and fine of Rs.2000/- i/d to under-go imprisonment of 3 months for the offence u/s.366 I.P.Code and Imprisonment for life and to pay fine of Rs.5000/- i/d to under-go 6 months imprisonment for the offence u/s.376 I.P.Code, respectively.

2. Ms.Banna S. Datta, learned Advocate was appointed to defend the appellant - accused in this Appeal. This Appeal was listed at Sr.No.31 in our running final hearing Board dated 26.11.2001. When the matter was called out she had not remained present. We waited for her for quite some time, but she had not turned up, therefore, this Appeal is decided with the due assistance of learned A.P.P. Shri K.P.Raval for the respondent - State, as this is an old Appeal of 1993.

3. Usman Jamalbhai lodged F.I.R. Ex.17 on 9.3.1992 before Bagasara Police Station stating that on last Thursday i.e. on 5.3.1992 at about 7.00 p.m. he was in his house. At that time his younger sister Rashida Munni was also at home. She left the house on the excuse of make-water, but she did not turn up for about an hour or so. Therefore, they went in search of her, but they could not found her. On enquiry they came to know that Fakir Sikandar Kasam, aged about 25 years, from Junagadh came to his neighbour's house of Rania Javerbhai Nathbava, he also left at that time. Thereafter he was informed by his neighbour Bai Mabuben and rickshaw driver Karimbhai Pinjara and one Shri Rafikbhai working as Labour in S.T. and others that Fakir Sikandar Kasam kidnapped his sister Rashida and they had seen both of them on the way. Thus, there is a delay of 4 days in lodging F.I.R. regarding commission of an offence which was also explained by the complainant Usmanbhai in his complaint itself by stating that he had gone in search of his sister at Junagadh, Sasan, Kodinar, Veraval, Patan, Satadhar, Visavadar, Bilkha, Bhensan, Parabvavadi, Medpara, Chalala, Savarkundla, Vijpadi, etc. villages, but she could not find his sister Rashida, therefore at last he had come to lodge the complaint on that day.

4. It is also stated in the F.I.R. that said Fakir Sikandar Kasam used to come after a month or two at Bagasara at the place of Nathbava. He was doing Magic show at different places at Bagasara. He used to come quite often at his neighbour's place, therefore, he came to know his sister Rashida. On last Thursday i.e. on 5.3.1992 at about 7.00 p.m. he kidnapped and abducted his sister Rashida with an intention to commit rape. This is the story narrated after 4 days of the incident in his F.I.R. lodged before the Police.

5. Arrest Panchnama of the accused is at Ex.9. It is dated 16.3.1992. It was started at 9.30 p.m. and over at 10.00 p.m. From the Arrest Panchnama of the accused it appears that Ranavav Police called Panchas on S.T.Bus stand for arresting the accused which was suspected to be involved in an offence and found in suspicious condition. He was accused Salimsha @ Sikandar, aged about 20 years. He was arrested u/s.41(1)(a) Cr.P.C.

6. P.S.I. Shri Gangabhai Laxmanbhai, P.W.10, Ex.29 has stated in his evidence before the Court that he was doing petroling at Ranavav in the night of 16.3.1992 along with his staff. At that time one person, named, Usman Jamalbhai (complainant) from Bagasara told him that his sister Rashida is a minor, she has been kidnapped by Fakir Sikandar Kasamsha of Junagadh. Both of them are near Ranavav Bus stand. Thereupon, he went there and inquired from the boy and girl. They gave their name as Sikandar and Rashida. He found that the boy kidnapped the girl therefore in presence of Panchas he arrested the accused u/s.41(1) Cr.P.C. and thereafter informed Bagasara Police Station by wireless message. Accordingly, Circle P.I. Shri Manjariya came from Bagasara and took the accused in his custody.

7. In his cross - examination P.S.I. Gangabhai admitted that what he was told by the complainant Usmanbhai had not mentioned in his station diary though he felt that it was a serious offence. He had admitted that when the accused was arrested u/s.41(1) Cr.P.C. at that time Rashida was present but he had not recorded any statement of Rashida. He admitted that when the Arrest Panchnama of the accused was prepared the complainant Usman was present, but that was not mentioned. Presence of Rashida was also not shown in the Arrest Panchnama of the accused though she was present. His statement was not recorded by the officer who was investigating the case.

8. From the above, it is clear that from 5.3.1992

till the arrest of the accused on 16.3.1992, for about 11 days, the prosecutrix Rashida remained in company of the accused. As per the prosecution case, the prosecutrix Rashida was born on 16.6.1980, therefore, on the date of incident i.e. 5.3.1992 she would be hardly 11 years old. As per the School Leaving Certificate Ex.23 she would be only 11 years old. However, the prosecutrix Rashidaben was examined on 18.3.1992 at Amreli Civil Hospital by Dr.Diksha Vaishnav, P.W.1, Ex.13. She had stated that her hymen was ruptured, but there was no swelling nor any semen were found. For deciding the age of prosecutrix Ossification test was done and as per the condition of her bones, she opined that the age of Rashida was more than 15 years and as per the X-Ray of hand she would be less than 16-1/2 years. Her heap bone were not joined therefore according to the Doctor she would be less than 19 years. However, as per her conclusion she would be between 15 and 16 years and there was no evidence regarding immediate intercourse before her examination. She had also examined accused Sikandar on that very day. As per her evidence he was above 17, 18 or 19 years. He was competent to have a sexual intercourse. As per her Certificate Ex.15 he was found to be above 19 years. In her cross - examination she had admitted that the age of prosecutrix Rashida could be 19 years.

9. Keeping in mind the medical evidence of Dr. Dikshaben we will have to consider the evidence of other prosecution witnesses.

10. Prosecutrix Rashida Jamalbhai, P.W.3, Ex.18 has stated in her chief examination that they are 4 sisters. She is youngest of all. She had studied upto 3rd standard. She has 2 brothers. The incident took place before 7 to 8 months. It was 7.00 p.m. She was at home. Her father, her mother and her brothers were at home. She went out-side for make-water (urinal). Sikandar (accused) did something to her, therefore she followed him. They went to bus stand and had tea at Rafik's hotel. Karim had seen them. Thereafter they sat in bus going to Junagadh and reached Junagadh at 10.00 p.m. At Junagadh they first went to the house of the sister of Sikandar. There in the hut they passed the night. She was sleeping near Sikandar and sister of Sikandar and her husband slept outside. He (Sikandar) removed her clothes and slept over her and committed rape. For a day, they stayed at Junagadh. On the next day they went to Jamnagar at the house of Subhanbai, sister of the accused. They stayed for a day. Nothing happened at Jamnagar. Thereafter they went to Jam Khambhalia. In Jam Khambhalia they were staying in open Medan for about

2 to 3 days. In open Medan Sikandarused to have intercourse as he had done earlier. There also they stayed in open medan. There also also the accused was having sexual intercourse with her. Her brother came to Ranavav on motor cycle, he saw them and thereafter police took them to the police Station. Police interrogated them, thereafter his brother informed the Police at Bagasara by wireless and police came from Bagasara and took them to Amreli, where their medical examination was done. At the time of their medical examination her mother was with her. Sikandar was also there. His examination was also done. Police recorded her statement.

11. In her cross examination she had stated that she had not obtained school leaving certificate. She was not knowing her birth-date. They stayed at Ranavav in the night. On the next day night they were brought to Bagasara by police and on the next day she was brought to Amreli Hospital. She admitted in her cross examination that when she left her house she was all alone. Sikandar was standing alone at the canteen of Kantibapa. Sikandar started walking ahead and she followed him because he did something to her. She was knowing Rafikbhai earlier. At the place of Rafikbhai they halted for half an hour. She did not till Rafikbhai that Sikandar has done something to her. When she was asked she stated that she is not aware that she has stated in her statement before the police that Sikandar done something to her. She had admitted in her cross examination that Sikandar had not taken away her by temptation " ".
She has denied in her cross examination that for marrying her he took her away.

She further admitted in her cross examination that she had not stated in her statement before the Police that Karimbhai had seen them. She had not seen Karimbhai but Karimbhai had seen them. She had first stated that she had not seen Karimbhai, but then immediately stated that Karimbhai had seen them because Karimbhai told her that he had seen them. Karimbhai was not knowing Sikandar. She knows Karimbhai since long. She does not know as to whether Karim had good influence in Police. She had also stated that she does not know how many people were staying at the house in Junagadh where they stayed at night. She had seen the members in the house, but in the morning she did not disclose about the rape being committed by Sikandar at night to anybody in the house where they stayed at Junagadh. On the next day Sikandar had gone out and she stayed at his sister's place, but at that time also she did not disclose about

this to his sister. She had admitted that she had never made any attempt to run away from the place like Junagadh, Jamnagar, Ranavav, etc. where she stayed with accused Sikandar. She had not even told Sikandar to drop her at her father's place. She admitted that whenever Sikandar was doing intercourse she had never raised any shouts. They were staying in open Medan and Sikandar was going out. Just near Medan pakka road was passing on which number of vehicles were going. In the Medan sister of Sikandar was staying with them. She accompanied them everywhere. When Usman (her brother - complainant) met at that time also sister of Sikandar was there with them. She had not disclosed about the incident to her parents till date.

In her further cross examination she was not bother to admit that she was knowing Sikandar since long. She has only stated that just before 4 to 5 days of incident she saw Sikandar and she had never seen him prior to that. After the incident till date of deposition she had never seen Sikandar. She had denied the suggestion made to her that she was tutored by the police to say that Sikandar kidnapped her. She had denied the suggestion that she ran away with someone else, but at the instance of her brother and father he has falsely given the name of the accused. She has denied that she was of 18 years.

12. Learned Judge fully relied on the evidence of prosecutrix Rashida for convicting the appellant accused for the offences u/s. 363, 366 and 376 I.P. Code. We have almost reproduced the evidence of prosecutrix Rashida in her chief as well as cross examination.

13. From the F.I.R. lodged by Usman Ex.17, brother of the prosecutrix, it is clear that accused Sikandar and Rashida were knowing each other since long. Accused Sikandar used to come to his neighbour's place quite often from Junagadh. As per F.I.R. and the evidence of the prosecution witnesses, including the evidence of prosecutrix Rashida it is clear that on the day of the incident i.e. on 5.3.1992 in the evening at 7.00 p.m. Rashida was at home and at that time he, his parents and his sister were present at home. She left the house on the excuse of make-water. That shows that everything was planned well in advance and Rashida was the consenting party to leave the house and she had gone with accused Sikandar at her own will. As per cross Examination Sikandar was standing at the canteen of Kantibapa. He started walking ahead and she followed him because he did something to her. He had no talk with her. They waited

at the hotel of Rafik for half an hour, but she did not tell anything to Rafik that Sikandar did something to her. She was fully conscious and she was able to see, speak and walk properly. The story that the accused Sikandar did something to her coming for the first time before the Court because she had stated that she was not aware whether she had stated that fact in her police statement or not. In categorical term she had admitted that she was not lured by Sikandar. The way in which she deposed about Karimbhai raises serious doubt about her testimony. She had not stated in her police statement that Karimbhai had seen them. She had not seen Karimbhai but Karimbhai seen them. Later on she tried to improve her version that Karimbhai seen her as Karimbhai told her that he had seen them. This was not told to her brother. If according to her evidence the accused had committed forcibly rape then she would have definitely raised shouts, but she did not raise any shouts. Before having intercourse the accused removed all the clothes from the body of the prosecutrix Rashida. Even assuming for the sake of the argument that the accused done something to the prosecutrix and because of that she was not in her control then also after 3 or 4 hours we are not prepared to believe that she would continue to remain under the control of the accused Sikandar. She had not disclosed about this fact to the sister of the accused Sikandar on the next day. She had admitted that she had never made any attempt to run away from all the places like Junagad, Jamnagar, Jam Khambhalia, Ranavav, etc. nor she had told Sikandar to send her back to her father's place. Even in open Medan they used to have intercourse regularly in presence of the sister of the accused. This is not possible unless and until she was a consenting party.

14. About the age of the prosecutrix we have a serious doubt. Though School Leave Certificate of the prosecutrix is produced on record at Ex.23 we are not prepared to place any reliance on it because as per that Certificate she was hardly 11 years old whereas medical evidence clearly shows that she was at least 19 years. When she herself was not aware about her birth-date then how her school leaving Certificate can be relied upon. Dr.Diksha Vaishnav, who has examined the prosecutrix Rashida has clearly stated in her evidence that she was fully grown up and she would be about 19 years. In the instant case the accused was hardly 20 years old and it is clear from the F.I.R. as well as the evidence of the prosecutrix Rashida that there was a love affairs between the prosecutrix and the accused and because of that on her own Rashida left her parental house and went along with accused Sikandar for the purpose of marrying with

him.

15. Usman Jamal, P.W.2, Ex.16, is the brother of prosecutrix Rashida. He has lodged F.I.R. after 4 days of incident i.e. on 9.3.1992. He tried to explained the gross delay in lodging F.I.R. by stating that he remained in search of his sister from place to place. When he was already told by Rafikbhai and Karimbhai on the very next day of incident i.e. on 5.3.1992 that they had seen his sister Rashida going on bus stand along with accused then at once he should have lodged F.I.R. In F.I.R. itself it is stated that accused was coming quite often to Bagasara from Junagadh and he was knowing his sister very well. He himself stated in F.I.R. Ex.17 that when they were at home his sister Rasida left their house on excuse of make water (Urinal).

16. In view of the above evidence we are of the opinion that in the instant case the prosecution failed to prove its case that on the day of the incident i.e. on 5.3.1992 prosecutrix Rasida was below 16 years and against her will she was kidnapped and abducted from her parental custody by the accused with an intention to commit rape and the accused committed rape to prosecutrix Rasida at Junagadh, Ranavav and other places. Once we come to the conclusion that the prosecutrix was aged above 18 years then no offence is made out u/s.363, 366 and 376 of the I.P.Code. All through-out she was a consenting party and therefore the appellant - accused cannot be held guilty for the aforesaid offences.

17. Having carefully gone through the Judgment of the learned Sessions Judge we are of the considered opinion that the learned Sessions Judge was more impressed by the prosecution version that prosecutrix was hardly 12 years and she was kidnapped by the appellant - accused and the rape was committed on her. Unfortunately the aforesaid salient features of the case and the evidence of the prosecution witnesses have not been properly considered by the learned Sessions Judge. In that view of the matter we have no option but to set aside the order of conviction and sentence passed by the learned Sessions Judge.

18. Accordingly this Appeal is allowed. The impugned Judgment and order of conviction and sentence dated 21.10.1992 passed by the learned Sessions Judge, Amreli, in Sessions case No. 62 of 1992 convicting the appellant accused for the offences u/ss. 363, 366 and 376 of the Indian Penal Code and sentenced him to suffer 2 years R.I. and fine of Rs.1000/- i/d.2 months imprisonment for

the offence u/s.363 I.P.Code, 3 years R.I. and fine of Rs.2000/- i/d.3 months imprisonment for the offence u/s.366 I.P.Code and Imprisonment for life and fine of Rs.5000/- i/d. R.I. for 6 months for the offence u/s.376 I.P.Code is hereby quashed and set aside. The appellant - accused is ordered to be acquitted for all the aforesaid charges. While admitting this Appeal, he is released on Bail therefore his Bail Bond stands cancelled. Fine if paid, be refunded to the appellant - accused.

sd/-

(B.J.Shethna,J.)

Date : 24.12.2001 sd/-

(D. P. Buch, J.)

sas